

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

ARIEL PAULINO,

Plaintiff,

v.

9:12-CV-00076
(TJM/TWD)

BRIAN FISCHER, CAPT. KNAPP; INVESTIGATOR
NUNEZ; PATRICIA LACONEY,

Defendants.

THOMAS J. McAVOY
Senior United States District Judge

DECISION and ORDER

I. INTRODUCTION

This *pro se* action brought pursuant to 42 U.S.C. § 1983 was referred to the Hon. Thérèse Wiley Dancks, United States Magistrate Judge, for a Report and Recommendation pursuant to 28 U.S.C. § 636(b) and Local Rule N.D.N.Y. 72.3(c). In her June 14, 2013 Report-Recommendation (Dkt. No. 26), Magistrate Judge Dancks recommends that Defendants' motion to dismiss (Dkt. No. 22) be granted in part and denied in part. No objections to the Report-Recommendation and Order have been filed, and the time to do so has expired.¹

¹The Docket indicates that the Report-Recommendation and Order was served on Plaintiff at his Bare Hill Correctional Facility address but was returned as "undeliverable" with a notation on the envelope that reads "NOT HERE RETURN TO SENDER, ME 3/1". In the interim between service and return, Plaintiff provided a notice of change of address indicating that he had been released from incarceration. On July 5, 2013, the Clerk's Office re-served the Report-Recommendation and Order on Plaintiff by mailing it to his newly reported address. No objections have been received from Plaintiff.

II. DISCUSSION

After examining the record, this Court has determined that the Report-Recommendation and Order is not subject to attack for plain error or manifest injustice.

III. CONCLUSION

Accordingly, the Court **ADOPTS** the Report-Recommendation and Order for the reasons stated therein. Defendants' Rule 12(b)(6) motion to dismiss (Dkt. No. 22) is GRANTED in part and DENIED in part as follows:

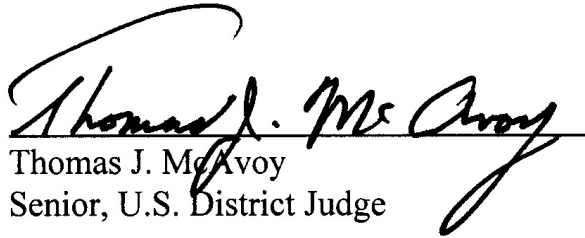
(1) Defendants' motion to dismiss Plaintiff's claim for money damages against Defendants in their official capacities on Eleventh Amendment grounds is GRANTED as to all Defendants, including the non-moving Doe Defendants; and

(2) Defendants' motion to dismiss Plaintiff's Amended Complaint in its entirety under Heck v. Humphrey, 512 U.S. 477 (1994) is DENIED **provided** Plaintiff advise the Court in writing, within thirty (30) days of the date of this Decision and Order, that he waives for all time all claims in this action relating to disciplinary sanctions that affected the duration of his confinement. This waiver will allow Plaintiff to proceed with his claim challenging the disciplinary sanctions affecting the conditions of his confinement. Plaintiff's failure to file the required waiver statement within thirty (30) days will be considered as his refusal to waive the duration of confinement claim, and such failure will result in dismissal of this action without prejudice without further order by the Court; and

(3) Defendants' motion to dismiss Plaintiff's claim for emotional and mental distress is DENIED.

IT IS SO ORDERED

Dated: September 16, 2013


Thomas J. McAvoy
Senior, U.S. District Judge